IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

No. 3:19-cv-00011

SOUTHERN ENVIRONMENTAL LAW CENTER,

Plaintiff,

v.

DAVID BERNHARDT, in his official capacity as Acting Secretary of the Department of the Interior,

DANIEL SMITH, in his official capacity as Deputy Director Exercising the Authority of Director for the National Park Service, an agency within the Department of the Interior, and

DANIEL JORJANI, in his official capacity as Principal Deputy Solicitor Exercising the Authority of Solicitor, the head of the Office of the Solicitor, an agency within the Department of Interior,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This Freedom of Information Act ("FOIA") suit challenges Defendants' unlawful and unreasonable delay in responding to requests for records relating to the Atlantic Coast Pipeline.

2. Plaintiff Southern Environmental Law Center ("SELC"), a nonprofit public interest organization dedicated to protecting the environment of the Southeast, requested information in the custody of the National Park Service ("NPS") on December 14, 2017. The

information related to the Atlantic Coast Pipeline, a time-sensitive matter of extraordinary public concern.

3. After an initial exchange of communications acknowledging the request and Plaintiff's voluntary narrowing of the request to reduce its scope, NPS has ceased responding to Plaintiff's inquiries about the request's status and has not provided responsive records.

4. Prior to SELC's request, and while it was pending, Defendants adopted policies and practices that directly caused or contributed to the unlawful withholding of the requested public records.

5. Defendants have violated FOIA by failing to promptly provide requested information and make a determination within 20 working days of receiving a request. 5 U.S.C. § 552(a)(3)(A), (a)(6)(A). SELC seeks a declaration that Defendants have violated FOIA and an order requiring Defendants to provide all nonexempt, responsive documents without further delay and enjoining the use of Defendants' unlawful policies and practices.

JURISDICTION AND VENUE

6. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552, 28 U.S.C. § 1331, and 28 U.S.C. § 2201.

7. Pursuant to 5 U.S.C. § 552(a)(6)(C)(i), SELC is "deemed to have exhausted [its] administrative remedies" because Defendants have "fail[ed] to comply with the applicable time limit provisions."

8. Venue is proper in this Court under 5 U.S.C. § 552(a)(4)(B). SELC is a 501(c)(3) nonprofit organization headquartered and residing in Charlottesville, Virginia, in the Western District of Virginia.

PARTIES

Plaintiffs

9. SELC is a 501(c)(3), nonprofit public interest environmental law firm with a focus on six southeastern states.

10. SELC is a "person" for purposes of FOIA, 5 U.S.C. § 551(2).

11. SELC uses public advocacy and the law to protect the people and the natural resources of the Southeast and, in particular, to gather, analyze, and disseminate public information about activities affecting human health and the environment in the Southeast. SELC disseminates public information it gathers to the general public through its website, *southernenvironment.org*, which is updated regularly, as well as press releases, social media, and public comment letters. SELC attorneys also regularly attend and speak at public meetings and hearings throughout the region, informed by and sharing their analysis of public information. SELC has been actively engaged in protecting the environment of the Southeast at the federal, state, and local levels for three decades.

12. As part of its mission, SELC regularly submits FOIA requests to agencies within the Department of the Interior, including the NPS. SELC intends to continue submitting such requests in the future.

Defendants

13. The Department of the Interior is an "agency" for purposes of FOIA. David Bernhardt, named in his official capacity as Acting Secretary of the Department of the Interior, has ultimate responsibility for the decisions of the Department and agencies within it, including the National Park Service and the Office of the Solicitor.

14. NPS is an "agency" for purposes of FOIA. Daniel Smith, named in his official capacity as Deputy Director Exercising the Authority of Director for the National Park Service, has assumed responsibility for the decisions of NPS under the color of law pursuant to Secretarial Order 3345, Amendment No. 24 (January 29, 2019).

15. The Office of the Solicitor is an "agency" for purposes of FOIA. Daniel Jorjani, named in his official capacity as Principal Deputy Solicitor Exercising the Authority of Solicitor, has assumed responsibility for the decisions of the Office of the Solicitor under the color of law pursuant to Secretarial Order 3345, Amendment No. 24 (January 29, 2019).

16. NPS, the Office of the Solicitor, and/or other bureaus or officials within the Department of Interior have possession or control of the requested information.

FACTS

17. Fourteen months ago, on December 14, 2017, SELC submitted a FOIA request to NPS seeking "records … related to the [Atlantic Coast Pipeline's] crossing of the Blue Ridge Parkway or Appalachian National Scenic Trail." A copy of this FOIA request is attached as Exhibit 1.

18. Defendants have withheld the requested information from SELC and have failed to make a determination within 20 days as required by FOIA.

The Atlantic Coast Pipeline

19. The Atlantic Coast Pipeline ("the Pipeline") is an interstate natural gas pipeline that, as proposed, would cross both the Blue Ridge Parkway and the Appalachian National Scenic Trail, both of which are units of the National Park System and administered by NPS.

20. The Blue Ridge Parkway is the most visited unit in the National Park System. As proposed and permitted by Defendants, the Pipeline would scar views from two of the Parkway's

scenic overlooks.

21. The Appalachian National Scenic Trail is a globally recognized footpath that receives over 3 million visitors annually and has been administered by the Department of the Interior since 1968. Pipeline construction would impact trail users.

22. The Federal Energy Regulatory Commission ("FERC") is responsible for approving the Pipeline, but FERC's final approval of the Pipeline hinges on the issuance of permits by other agencies with jurisdiction, including components of the Department of Interior such as NPS and the U.S. Fish and Wildlife Service.

23. For years, federal permitting agencies, including those within the Department of the Interior, were not prepared to allow the Pipeline to move forward without additional analysis and mitigation. Although their concerns were not addressed, federal agencies nonetheless abruptly reversed course in late 2016 and began issuing project approvals in 2017.

24. These sudden reversals were not justified by the permitting agencies. Each and every permit for the Pipeline issued by a component of Department of Interior, including NPS, or directly affecting resources within the jurisdiction of the Department of Interior, has since been invalidated as arbitrary and capricious, withdrawn, or stayed pending judicial review.

25. The U.S. Fish and Wildlife Service's permit was vacated by the Fourth Circuit Court of Appeals on May 15, 2018, because it was arbitrary and capricious and failed to set enforceable limits on the amount of harm Atlantic and FERC could inflict on threatened and endangered species.

26. The U.S. Forest Service permit decision purporting to allow the Pipeline to cross the NPS-administered Appalachian National Scenic Trail, which was unlawfully issued with the consent of NPS, was vacated by the Fourth Circuit Court of Appeals on December 13, 2018,

because it was arbitrary and capricious and beyond the agency's statutory authority.

27. The NPS permit decision authorizing the Pipeline to cross the Blue Ridge Parkway was vacated by the Fourth Circuit Court of Appeals on August 6, 2018, because it was arbitrary and capricious and because the agency failed to demonstrate that the pipeline crossing was consistent with the use of the Blue Ridge Parkway for park purposes.

28. On September 14, 2018, almost immediately after the NPS permit authorizing the Pipeline to cross the Blue Ridge Parkway was invalidated, Defendants reissued the permit in substantially identical form and largely on the same administrative record. That permit was also challenged, and Defendants voluntarily withdrew it in order to "reconsider its determinations regarding the impact of the right-of-way on the environmental and cultural resources of the Parkway." Resp'ts' Mot. for Vol. Remand, *Sierra Club v. National Park Service*, Case No. 18-2095 (4th Cir. Jan. 16, 2019) (ECF No. 50).

29. These controversies related to the pipeline are matters of ongoing public concern. Despite court decisions invalidating necessary approvals Atlantic has announced in the press that it is confident NPS will "promptly…reissue the permit" allowing the crossing of Blue Ridge Parkway to proceed. Dominion recently informed its investors that it expects the pipeline will be partly operational by the end of 2020 and fully operational by the end of 2021. To meet that promised schedule, Atlantic must obtain needed permits and begin construction immediately.

Unavailability of the Requested Information

30. Only minimal information about Defendants' involvement in approving the Pipeline's impacts to the Blue Ridge Parkway and the Appalachian National Scenic Trail has been made available through the submission of the Administrative Record in connection with legal challenges to the respective permits.

31. For example, the record of NPS's decision to authorize the proposed crossing of the Blue Ridge Parkway did not include "any explanation, let alone a satisfactory one," as to why the Pipeline crossing would be "consistent with the purposes of the Parkway and the Park System." *Sierra Club v. United States Dep't of the Interior*, 899 F.3d 260, 293 (4th Cir. 2018).

32. The Administrative Record filed by NPS in *Sierra Club* did not adequately explain NPS's decision to approve the Blue Ridge Parkway crossing because of an Administration-wide policy to exclude deliberative documents categorically from Administrative Records. The October 20, 2017 Memorandum describing that policy is attached as Exhibit 2.

33. In addition to the Administration-wide policy to exclude deliberative documents categorically from Administrative Records, the Department of Interior or bureau(s) thereof have been instructed by the Department of Justice with respect to the Atlantic Coast Pipeline in particular to prepare a "more limited" Administrative Record.

34. The Administrative Record filed by NPS with the Court to document its two-year long process considering the Atlantic Coast Pipeline's proposed crossing of the Blue Ridge Parkway consisted of fewer than 100 documents.

35. The basis for NPS's unlawful decision to approve the Pipeline's crossing of the Blue Ridge Parkway would be documented, if at all, in the records that are the subject of this Complaint, which Defendants have not provided.

Defendants' Failure to Timely Process SELC's Request

36. SELC submitted its request for "records … related to the crossing of the Blue Ridge Parkway or Appalachian National Scenic Trail" on December 14, 2017, the same day that news reports first disclosed that NPS had issued a permit for the ACP to cross the Blue Ridge Parkway.

37. SELC staff called the FOIA officer assigned to their request as well as the Headquarters Office of the Blue Ridge Parkway multiple times asking NPS to share informally the final permit it had issued for the ACP, without success. Although the National Park Service maintains a public information website for planning activities related to the Blue Ridge Parkway, no documents related to the project have been posted there. NPS staff from the Blue Ridge Parkway Supervisor's office informed SELC that sharing that final document would require approval from senior management.

38. Finally, on December 22, 2017, Atlantic posted the permit as an attachment to a regular weekly status report filed in the electronic docket for the project maintained by FERC. SELC staff discovered it there on December 29, 2017, and, after reviewing and confirming that the authorization was issued without valid statutory authority, filed a Petition for Review on behalf of their clients on January 19, 2018. In briefing in that case, NPS faulted petitioners for waiting "38 days after NPS granted the right-of-way" before challenging the approval.

39. On January 9, 2018, SELC requested an update on the status of its December 14, 2017 FOIA request, and offered to help clarify the scope of the request, but NPS did not respond.

40. On February 28, 2018, two and a half months after SELC's request was submitted, NPS belatedly acknowledged its receipt and produced two documents, the final permits it had issued to Atlantic—the only two documents NPS knew for certain Petitioners already possessed.

41. In its February 28, 2018 communication, NPS also sought additional clarification of the request. NPS explained that "more than 90 NPS staff in more than a half dozen offices" would potentially have possession of responsive records. Despite being able to identify the requested records' custodians, NPS nonetheless took the position that the records were not

"describe[d] … in sufficient detail to enable an employee familiar with the subject area of the request to locate responsive records with a reasonable amount of effort."

42. In response to NPS's communication, SELC promptly clarified categories of records sought, which narrowed the scope of the request. Specifically, Plaintiff narrowed the date range and subject matter of the request on the good-faith assumption that Defendants would thereafter timely respond to the request as required by law. Plaintiff offered to narrow the request even further if NPS would describe the categories of responsive records.

43. NPS did not provide such a description but, eventually, on April 4, 2018, replied that agency staff were "working on preparing a list for you of materials or categories."

44. On May 23, 2018, Plaintiff contacted NPS for an update on the request. NPS replied they were working on "an advanced search query" for email searches and that NPS "will keep you posted."

45. On July 9, 2018, nearly seven months after the request was initially submitted and six weeks after NPS stated it was working on a search of digital records, Plaintiff again contacted NPS asking for an estimated date of completion for the request. That communication went unanswered.

Defendants' Policies and Practices Affecting SELC's Request

46. On May 24, 2018, the Department of Interior issued a memorandum (the "Awareness Process Memorandum") significantly affecting the production of digital records pursuant to FOIA. That memorandum is attached as Exhibit 3.

47. Pursuant to the Awareness Process Memorandum, all responsive emails and attachments must be searched for the names and email addresses of all political appointees within the Department of Interior. If any are found, the "full set of responsive records" must be

provided to those political appointee(s), and the Office of the Solicitor must be notified "simultaneously." The political appointee(s) and the Office of the Solicitor must be given 72 hours to review the records, which time may be further extended at the reviewers' request.

48. The Awareness Process Memorandum does not explain what role or expertise political appointees have in the fulfillment of the Department's statutory obligations under FOIA; the sole purpose offered is "to facilitate awareness of the information that will be released" and to allow reviewers to "follow up" as needed to "understand" the decision whether to disclose records.

49. A related policy, described in Secretarial Order 3371, attached as Exhibit 4, consolidates authority over the Department of Interior's FOIA program in the Office of the Solicitor, including final authority over any FOIA request or withholding, with the sole exception of requests to the Office of the Inspector General. The Office of the Solicitor does not have access to the factual information relevant to whether a record submitted to another bureau within the Department of Interior may be withheld unless such information is provided by that other bureau.

50. The policy described in the Awareness Process Memorandum simultaneously makes political appointees and attorneys in the Office of the Solicitor aware of the decision to disclose politically sensitive documents pursuant to FOIA, and thereby connects any concerned political appointee with an attorney who, under Secretarial Order 3371, can override the decision to disclose that document.

51. Also while SELC's request was pending, Defendants adopted yet another policy, this one intended to remain confidential, concerning the "coordination" of FOIA responses with the preparation of Administrative Records for decisions challenged under the Administrative

Procedure Act. Defendants' policy is expressed in a September 6, 2018 Memorandum to the U.S. Fish and Wildlife Service, hereinafter the "Deliberative Process Memorandum," which is attached as Exhibit 5.

52. The Deliberative Process Memorandum explains the Department of Interior's position that Administrative Records "should not include deliberative documents" and requires FOIA staff to "process FOIA requests in a manner most likely to preserve the consistency of information released under FOIA with information that could subsequently be included in an [Administrative Record]."

53. The Deliberative Process Memorandum further describes "categories of information and documents that should be considered for withholding in full or in part under [the] deliberative process privilege," and notes that "careful review" of FOIA responses is needed in order to "protect[] our decisions" and avoid discovery during related litigation.

54. The Deliberative Process Memorandum also incorporates by reference an earlier policy—the Foreseeable Harm Memorandum, attached as Exhibit 6—which itself creates an additional layer of review for deliberative documents: Whenever FOIA officers believe that disclosure of deliberative documents is appropriate, the Foreseeable Harm Memorandum requires them to consult again and "seek additional information" from other staff who may be able to provide a justification for withholding.

55. SELC's request has been subject to the policies and practices described in the Awareness Process Memorandum, Secretarial Order 3371, the Deliberative Process Memorandum, and the Foreseeable Harm Memorandum.

56. Defendants' policies and practices, as described separately in the Awareness Process Memorandum, Secretarial Order 3371, the Deliberative Process Memorandum, and the

Foreseeable Harm Memorandum, individually and together comprise a concerted effort to prevent the disclosure of records required to be disclosed under FOIA, and, upon information and belief have been the primary cause of the delays and withholdings affecting SELC's request.

57. Defendants' policies and practices described in the Awareness Process Memorandum, Secretarial Order 3371, the Deliberative Process Memorandum, and the Foreseeable Harm Memorandum have been adopted and implemented under the authority and direction of Defendants David Bernhardt, Daniel Smith, and Daniel Jorjani.

58. Under the process dictated by these policies, records responsive to SELC's request would be subjected to multiple reviews, including review by the Office of the Solicitor and/or political appointees within the Department of the Interior, for the purpose of withholding any records that might tend to show that agencies within the Department of Interior acted unlawfully or in bad faith with respect to approvals for the Pipeline.

59. Upon information and belief, SELC's FOIA request to NPS encompassed a number of records tending to show unlawful agency action and bad faith, which were made subject to delay, multiple layers of review, heightened scrutiny, and withholding under Defendants' policies.

Defendants' Unlawful Withholdings

60. To date, other than the belated provision of the two final permits themselves, neither NPS nor any other component of the Department of Interior has provided any documents responsive to Plaintiff's December 14, 2017 FOIA request to NPS.

61. Since May 25, 2018, SELC has not received any communication from Defendants related to the request.

62. More than 20 working days have passed since Plaintiff submitted this request.

63. The Department of Interior is continuing to process approvals for the Pipeline. Accordingly, the records sought by Plaintiff remain of urgent public interest. Delay associated with the production of these records is therefore tantamount to denial of documents.

Records Created Subsequent to SELC's Request

64. Subsequent to the submission of SELC's request, NPS has continued to create and receive records related to the Pipeline's crossing of the Blue Ridge Parkway and the Appalachian National Scenic Trail.

65. Had NPS fulfilled Plaintiff's request as required by law, Plaintiff would have been able to submit follow-up requests based on the information provided, which would have included records created or received up to the present date.

LEGAL BACKGROUND

66. The Freedom of Information Act, 5 U.S.C. § 552, reflects "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *Dep't of Air Force v. Rose*, 425 U.S. 352, 360–61 (1976) (quoting legislative history) (internal quotation marks omitted). FOIA "shines a light on government operations 'to check against corruption and to hold the governors accountable to the governed.'" *Coleman v. Drug Enforcement Admin.*, 714 F.3d 816, 818–19 (4th Cir. 2013) (quoting *Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.,* 437 U.S. 214, 242 (1978)).

67. "[T]he time provisions of the Act are central to its purpose." *Hayden v. U.S. Dep't of Justice*, 413 F. Supp. 1285, 1288 (D.D.C. 1976). FOIA requires federal agencies to "promptly" make records available upon request. 5 U.S.C. § 552(a)(3)(A). Agencies must "determine . . . whether to comply" with a request within 20 working days of receiving the

request, and they must "immediately notify" the requester of that determination. *Id.* § 552(a)(6)(A).

68. To make a "determination" under FOIA, "the agency must at least inform the requester of the scope of the documents that the agency will produce, as well as the scope of the documents that the agency plans to withhold under any FOIA exemptions." *Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm'n*, 711 F.3d 180, 186 (D.C. Cir. 2013).

69. Agencies may extend their deadline for responding by up to 10 working days if unusual circumstances apply and they provide timely notice to the requester. *Id.* § 552(a)(6)(B).

70. Agencies within the Department of Interior may extend the deadline to respond in order to seek clarification from a requester, but the deadline can be tolled only as long as "the time it takes [the requester] to respond to one written communication … reasonably asking for clarifying information." 43 C.F.R. §2.18(a).

71. Under FOIA, if the agency seeks to extend a deadline further than 10 working days, it must work with the requester to modify the request so it can be fulfilled within the 10 working day extension or arrange an alternative time period. 5 U.S.C. § 552(a)(6)(B)(ii).

72. Records may be withheld under FOIA only pursuant to one of FOIA's narrowly defined exemptions. 5 U.S.C. § 552(b).

73. Although Exemption 5 to FOIA incorporates the deliberative process privilege, deliberative documents cannot be categorically withheld. The FOIA Improvement Act of 2016, P.L. 114-185 (2016), was intended to codify a presumption of disclosure and to curb agencies' overuse of the deliberative process privilege. H.R. Rep. No. 114-391; S. Rep. No. 114-4. Deliberative documents must be disclosed unless the agency reasonably determines that

disclosure of that particular document would harm an interest protected by the deliberative process privilege. 5 U.S.C. § 552(a)(8)(A)(i)(I); *Rosenberg v. U.S. Dep't of Defense*, 342 F. Supp. 3d 62, 76-79 (D.D.C. 2018).

CLAIMS FOR RELIEF

Count 1 – Unlawful Withholding of Responsive Records

74. Plaintiff incorporates by reference paragraphs 1 through 73 of this Complaint as if fully stated herein.

75. Defendants have violated FOIA by failing to provide SELC with all non-exempt responsive records described in its FOIA request.

76. By failing to provide SELC with all non-exempt responsive records described in its FOIA request, Defendants have denied SELC's right to this information as provided by law under the Freedom of Information Act.

77. The unlawful withholding of records to which SELC is entitled lacks any substantial justification and is arbitrary and capricious.

78. During the time period in which Defendants have been in violation of FOIA, Defendants have continued to create and receive records related to the subject matter of SELC's request. Defendants' failure to timely respond to SELC's request has hampered SELC's ability to submit follow-up requests.

79. Unless enjoined by this Court to provide non-exempt, responsive records, including records created both prior to and subsequent to the date SELC's request was submitted, Defendants will continue to violate SELC's legal right to be provided with the records to which it is entitled under FOIA.

80. SELC is directly and adversely affected and aggrieved by Defendants' failure to provide responsive records to its FOIA request as described above.

Count 2 – Unlawful Policies and Practices that Caused or Contributed to Unlawful Withholdings

81. Plaintiff incorporates by reference paragraphs 1 through 73 of this Complaint as if fully stated herein.

82. Defendants' policy of mandatory review by political appointees and the Office of the Solicitor, as described in the Awareness Process Memorandum, adds an additional layer of review and associated delay to FOIA responses, which is not related to the fulfillment of Defendants' statutory obligations under FOIA. The Awareness Process Memorandum is in direct conflict with Defendants' statutory obligation to "promptly" make records available upon request and to make a determination within 20 days. *See* 5 U.S.C. § 552(a)(3)(A), (a)(6)(A). The Awareness Process also has the intent and the effect of interjecting political considerations into the decision whether to disclose documents under FOIA. *See* 5 U.S.C. § 552(a)(8)(A), (b).

83. Because the Office of the Solicitor lacks familiarity with the facts relevant to whether records may properly be withheld, the consolidation of authority over FOIA requests in the Office of the Solicitor, as described in Secretarial Order 3371, either causes inefficiency and delay inconsistent with FOIA's time limits, *see* 5 U.S.C. § 552(a)(3)(A), (a)(6)(A), or causes withholdings based on impermissible factors such as political sensitivity of the records, *see* 5 U.S.C. § 552(a)(8)(A), (b), or both.

84. Defendants' policy of "careful review" to ensure "consistency" between FOIA responses and Defendants' related policy of categorically excluding deliberative documents from Administrative Records, as described in the Deliberative Process Memorandum, is inconsistent with Defendants' legal obligation to withhold documents only when the agency reasonably

foresees that disclosure would harm an interest protected by the deliberative process privilege. *See* 5 U.S.C. § 552(a)(8)(A)(i)(I). It also causes or contributes to delays which are not related to lawful considerations under FOIA, and it is therefore inconsistent with Defendants' statutory obligation to "promptly" make records available upon request and to make a determination within 20 days. *See* 5 U.S.C. § 552(a)(3)(A), (a)(6)(A).

85. Defendants' policy of requiring FOIA staff to "seek additional information" rather than disclosing records whenever they find that disclosure would not cause foreseeable harm, as described in the Foreseeable Harm Memorandum, is inconsistent with Defendants' obligation to withhold documents only when the agency foresees that disclosure would harm an interest protected by a FOIA exemption. *See* 5 U.S.C. § 552(a)(8)(A)(i)(I). It also causes or contributes to delays which are not related to lawful considerations under FOIA, and it is therefore inconsistent with Defendants' statutory obligation to "promptly" make records available upon request and to make a determination within 20 days. *See* 5 U.S.C. § 552(a)(3)(A), (a)(6)(A).

86. Defendants' policies, separately and in concert, are designed to effect a broad policy of secrecy that is inconsistent with Defendants' obligations under FOIA. The policies require multiple layers of review, creating a process that is incapable of compliance with FOIA's time limits. These multiple layers of review and the consolidation of authority over FOIA in an office ill equipped to make factual determinations under FOIA are not intended to further FOIA's purposes or requirements, but are instead intended to facilitate the withholding of records for reasons not permitted or contemplated by FOIA, including avoiding political scrutiny, protecting unlawful agency decisions from judicial review, and avoiding discovery in cases where the records would show the agency acted in bad faith.

87. Defendants' policies, individually and in concert, caused or contributed to the delays and withholdings of the records sought by SELC's request.

88. Because SELC intends to continue submitting FOIA requests to agencies within the Department of Interior, Defendants' policies will continue to harm SELC's interests unless enjoined by this Court.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

(i) Declare that Defendants have violated and are continuing to violate FOIA by failing to timely respond to SELC's request with the determination required under FOIA;

(ii) Declare that Defendants have violated and are continuing to violate FOIA by improperly withholding documents that are responsive to SELC's request;

(iii) Direct Defendants to provide all nonexempt, responsive documents to SELC without further delay, including any and all records created or received up to the date of this Court's Order;

(iv) Declare that the policies set out in the Awareness Process Memorandum violate FOIA because they interfere with the agency's responsibility to "promptly" make records available upon request and are inconsistent with the obligation to disclose records unless disclosure would foreseeably harm an interest protected by a statutory exemption. 5 U.S.C. § 552(a)(3)(A) and (a)(8)(A)(i)(I).

(v) Declare that the policies set out in Secretarial Order 3371 violate FOIA because they interfere with the agency's responsibility to "promptly" make records available upon request and are inconsistent with the obligation to disclose records unless disclosure would

foreseeably harm an interest protected by a statutory exemption. 5 U.S.C. § 552(a)(3)(A) and (a)(8)(A)(i)(I).

(vi) Declare that the policies set out in the Deliberative Process Memorandum violate FOIA because they interfere with the agency's responsibility to "promptly" make records available upon request and are inconsistent with the obligation to disclose records unless disclosure would foreseeably harm an interest protected by a statutory exemption. 5 U.S.C. § 552(a)(3)(A) and (a)(8)(A)(i)(I).

(vii) Declare that the policies set out in the Foreseeable Harm Memorandum violate FOIA because they interfere with the agency's responsibility to "promptly" make records available upon request and are inconsistent with the obligation to disclose records unless disclosure would foreseeably harm an interest protected by a statutory exemption. 5 U.S.C. § 552(a)(3)(A) and (a)(8)(A)(i)(I).

(viii) Declare that these policies, taken together, violate FOIA because they preclude Defendants from meeting the time limits established by FOIA and because they are intended to facilitate the withholding of records for reasons not permitted or contemplated by FOIA, including avoiding political scrutiny, protecting unlawful agency decisions from judicial review, and avoiding discovery in cases where the records would show the agency acted in bad faith.

(ix) Enjoin Defendants' application of the unlawful policies and practices described in the Awareness Process Memorandum, Secretarial Order 3371, the Deliberative Process Memorandum, and the Foreseeable Harm Memorandum;

(x) Retain jurisdiction over this matter to rule on any assertions by Defendants that any responsive documents cannot be found or are exempt from disclosure;

(xi) Order Defendants to produce an index identifying any documents or parts thereof that it withholds and the basis for the withholdings pursuant to 5 U.S.C. §§ 552(a)(8) and 552(b), in the event that Defendants determine that certain responsive records are exempt from disclosure;

(xii) Award Plaintiff's reasonable attorneys' fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E);

(xiii) Find, pursuant to 5 U.S.C. § 552(a)(4)(F)(i), that the circumstances surrounding this withholding raise questions whether Defendants acted arbitrarily and capriciously with respect to the withholding; and find further that Defendants David Bernhardt, Daniel Smith, and Daniel Jorjani, by adopting and directing the implementation of policies and practices intended to cause unlawful delays and withholdings, are primarily responsible for the arbitrary and capricious conduct; and

(xiv) Grant any other relief the Court deems just and proper.

Respectfully submitted, this 21st day of February, 2019.

/s/ Kristin Davis
Local Counsel – VA Bar No. 85076

/s/ Sam Evans
Sam Evans – NC Bar No. 44992 (*pro hac vice* pending)

/s/ Kym Hunter
Kym Hunter – NC Bar No. 41333 (*pro hac vice* pending)

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